United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

545

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,136
(Cr. No. 1065-67)

WILLIAM FRANCIS COLLINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING OR CLARIFICATION

Appellant respectfully petitions this Court for rehearing or in the alternative for clarification of its judgment in the captioned case. As it now stands, the judgment of this Court is that "the judgment of conviction appealed from herein be affirmed" and that the case be remanded to the District Court for resentencing. However, the District Court's judgment of conviction, which was appealed from herein and which this Court's judgment affirms, includes an adjudication of guilt for five (5) separate offenses. 1/ Presumably the basis upon which this Court has ordered resentencing is that appellant should not have been adjudged guilty or resentenced on one or more of the five (5) offenses. Accordingly it is not clear, and by this petition we ask this Court to clarify, in what part the District Court's judgment of conviction stands affirmed and for what offenses appellant is to be resentenced on remand.

1/ Appellant was convicted, and adjudged guilty, and sentenced for (1) robbery of a savings and loan association in violation of 18 U.S.C. § 2113(a); (2) entering a savings and loan association with intent to rob in violation of 18 U.S.C. § 2113(a); (3) robbery by force and violence in violation of 22 D.C. Code § 2901; (4) and (5) two counts of simple assault in violation of 22 D.C. Code § 504.

This case was argued on January 13, 1970. The judgment of this Court, issued without opinion on January 23, 1970, provides in part:

> "On consideration thereof [record on appeal and argument of counsel] it is ordered and adjudged that the judgment of conviction appealed from herein be affirmed and, it is
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> FURTHER ORDERED by the Court that this case is remanded to the District Court for resentencing. See Prince v. United States, 352 U.S. 322 (1957) and the opinion of this Court in Coleman et al. v. United States, Nos. 21,804-5-6 and 21,856 decided November 28, 1969.

We ask in this petition that the language of this Court's judgment quoted above be amended to provide that the District Court's judgment of conviction is affirmed to the extent that it involves an adjudication of guilt for the offense of bank robbery in violation of 18 U.S.C. § 2113(a), that the District Court's judgment of conviction is vacated to the extent that it involves an adjudication of guilt for any other offense, and that the case is remanded for resentencing only on the bank robbery offense as to which the District Court's judgment of conviction is affirmed. 2/

In Prince v. United States, 352 U.S. 322 (1957), one of the cases cited in this Court's judgment herein, the Supreme Court held that an accused convicted of a "taking" or robbery in violation of 18 U.S.C. § 2113(a) could not also be convicted of "entering" with intent to rob in violation of that statute in connection with the same transaction, as the entering offense merges into the taking offense when the robbery is consummated. Consequently, the Court reversed a judgment imposing consecutive sentences for both the taking and the entering and remanded for resentencing on the taking count.

2/ While we remain of the view that the judgment of conviction should be reversed in its entirety, we recognize that the Court has rejected our arguments in that regard.

The matter first came before this Court in Bryant v. United States, ___ U.S. App. D.C. ___, 417 F.2d 555 (1969), in which concurrent sentences had been imposed on taking and entering counts arising out of the same transactions. This Court agreed with Bryant that the Prince decision established "that since he was convicted of the 'taking' under 18 U.S.C. § 2113(a) he could not also be convicted under the same section of the charges of 'entering' the associations to commit robbery." Id., at 558. This Court went on to state (id., at 558) that:

> "Applying Prince to the present case the convictions of appellant on the three charges of entering with intent to rob were not permissible, since those offenses in the circumstances merged into the completed robberies of which appellant was convicted. The 'entering' convictions accordingly must be set aside; and since we cannot say that the sentences for the affirmed convictions of robbery under Section 2113(a) were not influenced by the impermissible convictions under that section, we not only set aside the latter convictions as inconsistent with Prince but remand for resentencing on the robbery convictions under Section 2113(a) which we affirm." (Emphasis added.)

Coleman v. United States, Nos. 21,804-5-6 and 21,856 (not yet officially reported), which is the other case cited in this Court's judgment herein, followed Bryant in similar circumstances--concurrent sentences imposed on convictions for both taking and entering counts arising out of the same transaction. This Court there stated (Slip Op., at 17) that:

> "Although all of the sentences are to run concurrently, Prince v. United States, 352 U.S. 322 (1957) holds that one who is convicted of robbery under 18 U.S.C. § 2113(a) may not also be convicted under the same section of entering the Bank to commit robbery. We have recently considered this matter in Bryant v. United States . . . . In accordance with the procedure followed in that case and in the Prince case we therefore set aside the appellants' convictions on the second count of the indictment and remand for resentencing on the convictions under the other counts, which we affirm." (Emphasis added.)

Accordingly, the holding of the Prince and Coleman cases, and also of the Bryant case, is not only that a resentencing is required when either consecutive or concurrent sentences are imposed on a judgment of conviction for both a taking and an entering in violation of 18 U.S.C. § 2113(a) arising out of the same transaction, but also that the judgment of conviction is itself improper and must be set aside insofar as it includes conviction on the entering count. Indeed, as we understand those cases, it is the improper conviction on the entering count that necessitates a resentencing on those counts as to which the conviction was proper.

In this case, Collins was convicted of both taking and entering in violation of 18 U.S.C. § 2113(a) upon the basis of a single transaction--the robbery of a savings and loan association. Concurrent sentences were imposed on both counts. The situation of Collins in this regard, therefore, is identical to that of Bryant and Coleman, as we pointed out in our Reply Brief (pp. 7-9) in contending that the conviction of Collins on the entering count also should be set aside for that reason and that he must be resentenced even if other objections to the conviction should be rejected by the Court.[3/] As we recall, Government counsel agreed with that contention in the course of oral argument. We are convinced from these circumstances and from the citation of Prince and Coleman in this Court's judgment to support the remand for resentencing, that the Court intended to adhere to and apply the holdings in those cases (and in Bryant) so as to set aside the conviction on the entering count as well as require resentencing. Only if the conviction on at least one

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3/ This point was made in our Reply Brief upon the basis of Bryant, which was not decided until after our opening brief was filed. Coleman was not decided until after the Reply Brief was filed, and thus is not mentioned therein.

count is set aside would there by any basis for resentencing. But, if the Court intended to set aside the conviction on the entering count, in accord with Prince, Bryant and Coleman, the judgment entered by the Court inadvertently erred in ordering that the "judgment of conviction appealed from herein be affirmed. . . ." The "judgment of conviction" thus "affirmed" includes conviction on the entering count as well as on the other counts. This apparent mistake in this Court's judgment can only cause confusion upon remand if left uncorrected.

This brings us to a second point as to which we believe the Court's judgment to be unclear and as to which we are less certain concerning the intention of the Court. In addition to urging in our Reply Brief that the conviction on the entering count must be set aside in view of the Bryant decision (Coleman had not then been decided), we contended (pp. 9-12) that Collins' conviction of robbery under 22 D.C. Code § 2901 and of assault (two counts) under 22 D.C. Code § 504 should be set aside as well, and that Collins could properly be sentenced only for the taking in violation of 18 U.S.C. § 2113(a). While the Bryant opinion (as is also true of the Prince and Coleman opinions) did not consider a similar contention,[4/] we suggested that the principle of that opinion supported our contention that the assault and D.C. robbery convictions should be set aside, as did the decision of this Court on a cognate matter in Fuller v. United States, ___ U.S. App. D.C. ___, 407 F.2d 1199 (1967). Very briefly, we argued that the assault and D.C. robbery counts, which arose out of the same transaction as the taking and entering counts

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4/ Both the Bryant case and the Coleman case involved convictions of robbery in violation of 22 D.C. Code § 2901, and the Bryant case involved convictions of assault with a deadly weapon in violation of 22 D.C. Code § 502. The appellants in those cases apparently did not contend that those convictions should be set aside, as the opinions of the Court neither mention nor consider such a contention.

under 18 U.S.C. § 2113(a), were lesser-included offenses which merged into the taking offense upon the conviction for that offense. We did not understand Government counsel to contest that contention in his oral argument insofar as the assault counts are concerned, although he did argue to the contrary in regard to the D.C. robbery count.

We have noted our firm belief that this Court intended to set aside the conviction on the entering count and that the Court, therefore, must have inadvertently erred in ordering that "the judgment of conviction appealed from herein be affirmed. . . ." If that aspect of the judgment does not truly reflect the intention of the Court and thus is an inadvertent mistake in regard to the entering count, that may also be true in regard to the assault and the D.C. robbery counts. Hence, we do not believe that one can conclude from that statement that the Court intended to affirm, rather than to set aside, the convictions on the assault and D.C. robbery counts. In view of our argument that the principles of the Prince and Coleman decisions (as stated in Bryant) support our contention that the conviction on the assault and D.C. robbery counts should be set aside, the citation to those cases in the judgment may indicate that the Court agreed with that contention. But as noted above the opinions in those cases did not discuss such a contention, so that the citation of those cases does not indicate the intention of the Court in regard to the assault and D.C. robbery counts as plainly as it does in regard to the entering count. And, there is nothing else in the Court's judgment from which its intention in regard to the assault and D.C. robbery counts can be derived.

For the reasons stated in the Reply Brief for Appellant, we believe that the judgment of conviction should be set aside as to the assault and D.C. robbery courts as well as to the entering count. We are hopeful that the Court agreed with that contention, in which event we submit that its judgment should be amended to set aside the judgment of conviction on all counts except the count charging a taking in violation of 18 U.S.C. § 2113(a), to affirm the judgment of conviction on the taking count, and to remand for resentencing on the taking count only. If the Court intended to set aside the conviction on the entering count only, that could be made clear by amending its judgment to set aside the conviction on the entering count, to affirm the conviction on the other four counts, and to remand for resentencing on the other four counts.

But regardless of how the Court intended to decide these issues, we strongly urge that its judgment should be clarified to make its intent plain. We do not see how the present uncertainty can benefit anyone, and a clarification of the judgment should avert unnecessary controversy in the District Court with the attendant possibility of still another appeal. If the Court deems that these matters require further briefing or oral argument, we respectfully urge that the case be set down for rehearing in that regard.

Respectfully submitted,

Richard T. Conway

734 Fifteenth Street, N. W.
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I, Richard T. Conway, hereby certify that the foregoing Petition for Rehearing or Clarification has been served upon the United States by mailing a copy first class postage prepaid to Offices of United States Attorney, United States Court House, Washington, D. C. 20001, this 30th day of January, 1970.

Richard T. Conway

WILLIAM FRANCIS COLLINS

V.

U. S. NO. 22,136

(i)

BRIEF FOR APPELLANT

STATEMENT OF ISSUES */

The question presented is whether appellant was denied fair consideration of his only defense -- insanity:

(1) By a closing argument in which the prosecutor clearly implied:

(a) That a mental illness suffered by appellant while performing military service in 1944 was an indication of bad character, and

(b) That the jury should discredit both the professional competence and the personal integrity of a psychiatrist -- the principal defense witness -- on grounds that he had refused, pursuant to questions that the prosecutor failed to clarify at his request, to make a moral judgment about appellant's capacity to distinguish right from wrong.

(2) By the action of the trial court in:

(a) Instructing the jury that it could consider appellant's capacity to distinguish right from wrong, in determining his mental responsibility, when there was no evidence on appellant's capacity in this regard, and

(b) Failing to make the insanity instructions available to the jury in writing.

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*/ This case has not been heard previously by any panel of this Court.

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CITATIONS

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*Cases chiefly relied on are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,136

(Criminal No. 1065-67)

WILLIAM FRANCIS COLLINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court to enter its judgment of conviction rested on 11 D.C. Code §321. This Court has jurisdiction of the appeal from that judgment under 28 U.S.C. §1291.

REFERENCE TO RULINGS

The District Court issued no opinion or memorandum and made no oral or written findings. The judgment of conviction, entered on May 31, 1968, was based on the jury's verdict of guilty. A copy of the judgment may be found in the record on appeal.

STATEMENT OF THE CASE

Appellant contends in this appeal that the prosecutor's closing argument and the trial court's instructions denied him the kind of consideration of his insanity defense to which he was entitled and accordingly denied him a fair trial.

Appellant was convicted after a jury trial on all five counts of an indictment[1/] charging robbery and entry with intent to rob under the federal

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1/ The original indictment, filed on August 22, 1967, contained 26 counts charging robberies and assaults with dangerous weapons relating to five separate bank robberies dating back to 1963. At the beginning of trial, however, the Court required the prosecutor to elect on which of the five bank robberies he would go forward. The prosecutor elected to proceed on the alleged offenses of June 23, 1967, being counts 22-26 of the original indictment. The remaining counts were severed by the Court, sua sponte (Tr. 7), and the indictment was redrafted to reflect this action. During trial the Court granted motions for acquittal as to the two ADW charges (Tr. 361), and these counts went to the jury as simple assaults.

The trial proceedings are for the most part reported in eight volumes of transcript with pages numbered 1-856. References to these volumes in this brief are noted with the symbol "Tr." and a page number. The afternoon proceedings on the last day of trial, devoted to closing arguments and instructions, are reported in a separate 97-page volume. References to this volume are noted "2 Tr." and a page number. There is also a separate 21-page volume containing the pretrial mental competence proceedings, but there are no references to this volume in the brief.

bank robbery statute, 18 U.S.C. §2113(a), robbery under the local District of Columbia statute, 22 D.C. Code §2901, and two assaults under 22 D.C. Code §504. On May 31, 1968, appellant was sentenced to a term of imprisonment of from four (4) to twelve (12) years on each of the three robbery counts and to a term of one (1) year each of the assault counts, all sentences to run concurrently.

Prior to trial appellant was committed for a 60-day period to Saint Elizabeths Hospital for a mental examination as to his competence to stand trial and his mental condition on the date of the alleged offenses. A hearing was held on the hospital's report and appellant was found competent. No issue is raised on this appeal respecting the competency proceedings. Appellant was also examined before trial by a psychiatrist retained at his own expense. The only defense seriously pressed at the trial was insanity,[2/] and the only issues raised on appeal relate to the defense.

Apart from the question of mental responsibility, the evidence of appellant's guilt was strong. While we raise no issue respecting the sufficiency of admissibility of this evidence, we nevertheless undertake to summarize it briefly in part I of our factual statement. In part II of our statement we summarize the evidence presented by the defense and in rebuttal by the prosecution on the issue of mental responsibility. In parts III and IV we set forth the relevant portions of the prosecutor's closing argument and the trial court's instructions on which our claims on appeal are based.

2/ Three character witnesses testified for the defense (see Tr. 672-677) but trial counsel did not urge the jury to find appellant not guilty on the basis of this evidence or on any other basis. In closing argument he advised the jury that he was seeking only a verdict of not guilty by reason of insanity (2 Tr. 47).

I. <u>The Government's Evidence that Appellant Committed the Offense Charged</u>

The charges against appellant grew out of a robbery at the Connecticut Avenue branch of the Liberty Savings & Loan Association on the morning of June 28, 1967. Two tellers were alone in the bank when one man entered carrying a newspaper over his arm with what appeared to be a pistol beneath the paper (Tr. 90, 134-136). The tellers both complied with the man's demand to turn over their money. Some part of the $5010 turned over consisted of $20 bills bearing serial numbers that had previously been recorded (Tr. 93-94, 135). As the man left the bank, one of the tellers promptly pointed him out and reported the robbery to the building manager who chanced to be standing in an outer lobby at the time (Tr. 91). A chase through the building and into the street ensued during which the building manager was joined by another citizen in his pursuit of the robber (Tr. 161-167). The robber was under the continuous observation of his pursuers during the chase (Tr. 178), which ended after a short distance with the arrival of numerous police officers. The object of the chase was identified at trial by both the pursuers and the police witnesses as appellant (Tr. 170, 226, 258, 275, 301, 311).

Searched at the scene of arrest, appellant was found to be carrying a newspaper, a toy pistol, and $4,011 in cash (Tr. 103, 185, 231, 282). The $20 bills with previously recorded serial numbers were all found with the seized money (Tr. 185-186). Appellant was wearing two pairs of pants and a shirt without sleeves or back; inside his clothing he was carrying a hat and both a cloth bag and a paper shopping bag (Tr. 185, 228, 231-232, 239, 320).

Appellant was taken from the scene of his arrest to the scene of the crime, where he was identified by the two tellers, who also both identified him at trial (Tr. 108, 116, 143, 150).

There was a camera in the bank at the time of the robbery, timed to take one photograph every 15 seconds (Tr. 43). Two photographs were taken while the robbery was in progress and others were taken while the post-arrest identifications were being made at the bank. These photographs were received in evidence, and the bank witnesses and police witnesses identified themselves in the photos and identified the other man as the one who had committed the robbery and been arrested, whom they all in turn identified as appellant (Tr. 108-116, 143-149, 175-176, 183-184, 236-237).

Appellant did not testify. Apart from evidence on this issue of insanity, the only defense evidence consisted of the testimony of three character witnesses.

II. Evidence on the Insanity Issue

A. Presented by the defense

Two expert medical witnesses appeared on appellant's behalf. Dr. Elliot Blum was a clinical psychologist on the staff at Saint Elizabeths Hospital. Dr. Frank Caprio was psychiatrist engaged in private practice. In addition, appellant's brother, Mr. Joseph C. Collins, testified as a lay witness on the insanity issue.

Dr. Blum's testimony mainly concerned a series of five psychological tests that had been given to appellant toward the end of his 60-day pretrial commitment at the hospital. The tests had been given under Dr. Blum's general

supervision but not by him personally (Tr. 387). The witness based his judgments on the test results and on other case history materials compiled by the hospital staff (Tr. 387). He did not himself ever see appellant prior to the staff conference (Tr. 387).

The five psychological tests taken by appellant were: (1) the Wechsler Adult Intelligence Scale; (2) Bender-Gestalt Figure Drawing; (3) Projective Drawing; (4) Minnesota Multi-phasse Personality Inventory, and (5) Rohrschach Ink Blot (Tr. 390). The contents, purpose, and results of each test were explained in turn by the witness.

The Wechsler Scale was described as "a standardized intelligence test, popularly known as an IQ test," that was designed to show "a level of functioning" and "areas of relative competency and efficiency" (Tr. 391). Appellant attained a verbal score of 129 and a performance score of 121, for a combined full scale IQ of 127. These scores placed appellant in the "superior range" of intelligence, within the highest one or two percent in the population (Tr. 391-393).

The Bender-Gestalt test consists of nine geometric figures which the subject is asked to copy. Its primary purpose is to detect the presence or absence of organic brain damage. In Dr. Blum's opinion this test showed that appellant was without organic brain damage but that he was "quite anxious" and "impulsive" (Tr. 395-397).

In the Projective Drawing test, a subject is asked to draw one person of each sex. Appellant's drawings, in Dr. Blum's opinion, revealed a "lack of mature identification with other people" and "almost an emotional impoverishment, as opposed to his high intellect" (Tr. 400). "Feelings of inferiority" and "feelings of not being the kind of man he would like to be" were apparent (Tr. 402).

The Minnesota Multi-phrase Personality Inventory consists of more than 500 "yes" and "no" questions "testing various things like bodily complaints, feelings of anxiety, depression . . ." (Tr. 406). Appellant "came up with a profile that was by and large in the normal range" but there was "evidence of defensiveness," meaning that he was perhaps feigning "socially acceptable responses" (Tr. 407).

In the Rohrschach test the subject is shown a series of ten ink blots and asked what they represent. Appellant's performance on this test was "totally inconsistent with a person of superior intelligence" (Tr. 411). It revealed what the witness variously described as emotional "improvishment," "blunting," or "immaturity." It revealed:

> ". . . a depressed individual, who was sort of seeing his life passing him by, who was getting at the age now where he was looking over his life and seeing himself as a failure, and with feelings of inadequacy and feelings of inferiority, which was sort of affecting him mood-wise.
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> "And also it showed on the general level of being a person who is clamoring for attention, wants recognition, wants acceptance, wants love, and yet is too passive to reach out and get it. Things have to happen to him. He can't go and get it himself. And therefore he is frustrated, because certain dependency needs that he has and certain longings are unmet and unfulfilled for him" (Tr. 412).

Dr. Blum did not find evidence of an involutional or other psychosis (Tr. 428). He defined an "involutional psychosis" as a "disorder that is characterized by a prevailing depressive mood, depressive feelings, that can result in upsetting the person so much that he actually loses touch with and contact with reality" (Tr. 439).

Dr. Frank Caprio had examined appellant at the District of Columbia Jail in a three-hour interview two weeks before trial (Tr. 517, 551). He had arrived at a "medical diagnosis of involutional depression, with a preexisting . . . schizoid personality" (Tr. 517). He described "involutional depression" as a condition of "marked severity" that may occur late in the third decade but more

commonly occurs during the fourth or fifth decade of a man's life (appellant was 42 at the time of the trial -- Tr. 466, 527 -- and presumably had been 41 at the time of the offenses charged in the indictment), and he said that appellant manifested all the symptoms that typically characterize the condition (Tr. 517-518, 555-557). These symptoms Dr. Caprio identified as depression and a sense of hopelessness, suicidal ideas that often result in attempts at self-destruction, constant preoccupation with fears, delusions concerning bodily functions, guilt feelings without a determined source, lack of drive and initiative, and a "severe degree" of slowness and impairment in thinking known as "psycho-motor retardation" (Tr. 518-520). He said also that persons in this condition usually withdraw to some extent from personal relationships and from pursuits of business and recreation.[3/] They may also "engage actually in dis-social or even antisocial behavior, in that they fail to recognize the full meaning, the consequences, of their action or their behavior" (Tr. 521). There may be "psychotic features" associated with the condition, and in Dr. Caprio's view appellant "presented psychotic episodes." A psychosis he defined as "a defect in [the] ability to test reality . . . and/or . . . an abnormal mood or emotional feeling" (Tr. 552-553).

Dr. Caprio described "schizoid personality" as a condition or defect that "usually goes back into childhood" (Tr. 523, 527). He identified its characteristic features as avoidance of close personal relationships, introversion, day-dreaming or fantasy thinking, and a passive orientation toward other people without direct expression of aggression or hostility feelings (Tr. 523). He said that superior intelligence was not significant "with respect to an illness of this type," except that it was likely to present a contrast with an

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3/ We understand that all Dr. Caprio's general statements about the condition of involutional depression apply to appellant in view of his introductory remark that appellant presented all the symptoms.

individual's "actual performance, or his record in life" (Tr. 526). Appellant's poor academic record he viewed as an early illustration of the contrast between superior intelligence and actual performance (Tr. 629).

In reaching his diagnosis, Dr. Caprio had considered the life history related to him by appellant. He thought that appellant's disadvantaged childhood had a significant bearing on the development of the schizoid personality defect (Tr. 528, 604). He had also taken into account a summary that was made available to him of the psychological testing at Saint Elizabeths, and he disagreed with the interpretation of the hospital staff that these tests indicated an absence of involutional depression (Tr. 588-590, 644-645, 650-652).

On the question of causal connection between appellant's mental condition and the assumed offenses, Dr. Caprio testified that in his opinion:

> ". . . this specific act, dis-social act, can best be interpreted as reflecting a defect in his reasoning ability, a defect in his judgment
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> . . .
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> "He wanted some money. He knew that a bank was the place that had money. And because of his illness, he was not able to discern or comprehend the totality of his action. And, as a result, he did something which was very much in keeping with his illness" (Tr. 533-534).

In answer to questions by the prosecutor, the witness said that appellant had freedom of choice respecting the assumed offenses, in the sense that he was able to make conscious decisions to act or not to act, but that this freedom has "nothing to do" with the defect in reasoning and judgment to which the assumed acts were causally related (Tr. 595-596, 615-617).

Appellant's older brother, Joseph C. Collins, testified primarily about events of his own and appellant's childhood. He described an early life of

hardship. Their parents were separated and the two boys were placed briefly in a foster home when appellant was 7 years old (Tr. 470-471). They stayed mostly with their mother and had no relationship with their father even during the brief periods they lived with him (Tr. 472). Because of the mother's difficulty in finding employment, they moved from one location to another on 32 separate occasions that the witness could recall in the 1930's (Tr. 473). Appellant himself attended 15 schools before reaching the age of 16 (Tr. 476). He was impossible to converse with on any personal subject, and he never had any social life or serious interest in women and never married (Tr. 479-481). As a result of these conditions, which persisted until 1967, the witness had formed the opinion that appellant was of unsound mind at the time of the alleged offenses[4/] (Tr. 472).

B. Presented in rebuttal by the prosecution

One expert medical witness and several lay witnesses appeared in rebuttal for the prosecution. The expert was Dr. Maurice Platkin, a psychiatrist and chief of the maximum security division at Saint Elizabeths Hospital. The lay witnesses were two cafe operators, one service station operator, and two police officers with whom appellant had personal contacts prior to or on the date of the alleged offenses.

Dr. Platkin presided at the staff conference, which was held on September 14, 1967, toward the end of appellant's pretrial commitment and the purpose of which was to review any material relevant to the presence or absence of mental

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4/ The citizen who had joined in the chase from the bank and had identified appellant during his appearance as a prosecution witness was recalled as a defense witness on the insanity issue. In this connection he testified that his first "reaction," based on the events surrounding the chase, had been that the appellant "had a mental problem" (Tr. 672).

illness (Tr. 691-693). Appellant himself was present for one of the two hours consumed by the conference (Tr. 696, 716). According to the witness, appellant appeared at the conference to be well oriented and "a very bright man and quite perceptive and understanding." He spoke clearly about his past and "a number of problems he had in living." There was nothing unusual about his conduct or speech and "no suggestion he was out of contact or was not thinking clearly or had mental deficiency . . ." (Tr. 696-697).

Dr. Platkin had not himself examined appellant prior to the conference, but there was available a report of a prior psychiatric examination conducted by a Dr. Cuneo of the hospital staff (Tr. 713, 719). Also available to Dr. Platkin and considered by him were the admission notes concerning appellant's personal history, information concerning his medical history while in military service, ward notes concerning his behavior during commitment, and the oral report of Dr. Bium concerning the results of psychological testing (Tr. 689-690, 696-698, 730, 752-754, 760-762).

On the basis of his own observations at the staff conference and the other data available to him, Dr. Platkin concluded that mental illness did not exist and never had existed (Tr. 699-700). The possibility of an "involutional depression" was specifically raised and rejected at the conference 5/ (Tr. 745). Moreover, Dr. Platkin considered it "extremely unlikely" that a person in a state of involutional depression would commit the acts charged in the indictment (Tr. 764). He also viewed as "extremely small" the probability that a schizoid personality would engage in the real estate business, as other evidence indicated appellant had been engaged for several years prior to the alleged offenses (Tr. 759-760).

5/ Dr. Platkin acknowledged that the involutional state was sometimes referred to as a "psychosis" rather than a "depression." However, he considered "psychosis" an inappropriate term since the involutional state did not involve a "significant break with reality" but rather was marked by a severe depression and loss of interest in the environment (Tr. 763-764).

Three lay witnesses testified that they had been acquainted with appellant for varying periods of time, had seen him up to several times a week during the period immediately prior to June, 1967, and had never noticed anything bizarre in his behavior, speech, or contacts with other people (Tr. 677-682, 770-779, 782-788). Two police witnesses also testified in rebuttal that there had been nothing "bizarre" in appellant's speech or conduct on the day of his arrest (Tr. 792-799).

III. The Prosecutor's Closing Argument

We come now to the facts immediately relevant to the issues presented by this appeal. In this part III, we deal with the prosecutor's closing argument and in the connection set forth the evidence to which the argument pertained in its objectionable aspects. In the case of the argument and evidence respecting appellant's capacity to distinguish right from wrong, we also set forth the trial court's instruction to the expert witness whose testimony was the subject of the prosecutor's remarks.

A. Appellant's record of mental illness while in military service

1. The evidence. Part of the material that Dr. Platkin considered was a report received by the hospital indicating that appellant had experienced a mental illness while serving in the Air Force during World War II. The report indicated that appellant's condition had been diagnosed as: "Psychoneurosis mild, cause undetermined, manifested by anxiety, tension and somatic preoccupation" (Tr. 754). (Dr. Platkin testified that the standard diagnostic manual recognized "psychoneurosis" as a mental illness and that it was generally regarded as such by psychiatrists -- Tr. 727. He interpreted "somatic preoccupation" as excessive concern with the body -- Tr. 754.) The diagnosis had been made at a military hospital in Utah on June 10, 1944. The report did

not indicate how long appellant had remained hospitalized, but it described the disposition of the case as "Duty," and Dr. Platkin understood this to mean that appellant was "sent back to duty" (Tr. 754). It was not clear whether the diagnosis had been made by a medical doctor. There was no name associated with the case, but there was the job title, "First Lieutenant, Medical Administrative" [6/] (Tr. 753).

Appellant's military service records also indicated that he had been discharged on November 10, 1945, and Dr. Caprio had testified earlier in the trial that the discharge was honorable (Tr. 529, 754).

2. The argument. In his rebuttal argument to the jury, the prosecutor referred to the evidence that appellant had suffered mental illness while in military service. This is what he said:

> "Then he tells you, members of the jury, that this individual was psychiatrically sick when he was in the Service. The date, now, I think, comes to me, and the date he was in that hospital was, as I recall it, the 10th of June, 1944, shortly after D-Day which was on the 6th. But this examination, members of the jury -- this examination was in Utah.
>
> "What did it disclose? Psychoneurosis, mild.
>
> "May not this individual have been apprehensive because the landing had taken place shortly before that. Was he apprehensive, members of the jury? Was he apprehensive that he was going overseas? There is testimony here that he did go over to England, but I know not what day it was that he went to England. But the significant part of that, members of the jury, is that he was psychoneurotic at that time, mild. Was he given what we, anyone in the Service, would call a Section 8 discharge? Was he given a discharge because of medical or psychiatric reasons, members of the jury? No, 15 months later he was honorably discharged. So may we not conclude that this psychoneurosis mild was nothing. May it have been precipitated because this country was at war? May that be the reason he was apprehensive?" (2 Tr. 52-53)

6/ It is not clear whether the occupant of this position actually made the diagnosis or merely authorized the disposition of the case, or both.

while highly objectionable in other respects, this argument did at least correctly characterize appellant's military discharge as "honorable." However, in his opening argument to the jury the prosecutor had twice referred to that discharge as "bad conduct" (2 Tr. 8).

On the heels of the quoted remarks, defense counsel moved for a mistrial when the prosecutor concluded his argument (2 Tr. 57). He contended that the remarks were "prejudicial" and "totally unfounded" in their accusation "that this man was aggressive over going overseas." The motion was denied. Defense counsel did not ask that the jury be admonished to disregard the remarks, and no such admonition was given.

B. Appellant's request to distinguish right from wrong

1. The trial court's instruction to the expert witnesses. The trial court gave to each of the medical experts the standard instruction required to be given to such witnesses by this Court's decision in Washington v. United States, 129 U.S. App. D.C. ___, 390 F.2d 444 (1967). Part of the instruction given was as follows:

> "When you are asked questions which fall within the scope of your training and experience, you may answer them, if you feel competent to do so. Otherwise you should not answer them.
>
> "If the answer depends upon knowledge and experience generally possessed by ordinary citizens -- for example, questions of morality as distinguished from medical knowledge and clinical psychology knowledge -- you should not answer them. You should try to separate expert medical or psychological judgments from what we call "lay" judgments.
>
> . . .
>
> "Where words or phrases used by counsel are unclear or may have more than one meaning, you should ask for clarification before answering. You should then explain your answer so that your understanding of the question is clear. You need not give yes or no answers. In this way any confusion may be cleared up before the questioning goes on" (Tr. 383-384).

2.. The evidence. Dr. Caprio received a written copy of the Court's instruction before testifying 7/ (Tr. 513). During cross-examination of this witness by the prosecutor, the following exchange occurred (Tr. 594-595):

Mr. Caputy: Now let me ask you, sir: Was this individual, on June 28, 1967, able . . . to distinguish between right and wrong?

Dr. Caprio: I don't know what you mean by "right and wrong."

Mr. Caputy: Well, have you heard of the expression, "free will"?

Dr. Caprio: Yes, I have heard of it.

Mr. Caputy: And as a psychiatrist, what do you recognize as the exercise of freedom of the will?

Dr. Caprio: Where the individual has the ability to decide consciously for himself what he will or he won't do, without a lot of unconscious processes motivating him -- assuming he isn't coerced into doing something, or compelled by some other person -- within the individual himself; that he is governed mainly by conscious processes.

Mr. Caputy: Was he, the defendant Collins, on June 28, 1967, able to exercise that freedom of the will or freedom of choice of going into the bank or not going into the bank?

Dr. Caprio: He could make that decision, yes, --

Mr. Caputy: He could make that decision.

Dr. Caprio: -- whether to go in or not to go in.

Mr. Caputy: And was he able at that time to distinguish between right and wrong, and adhere to the right and resist the wrong?

Dr. Caprio: I don't know what you mean by "right and wrong."

7/ The practice of the trial judge, as explained at Tr. 385, is to read the instruction to the jury when the first expert witness -- in this case Dr. Blum -- takes the stand, and to give the first and each succeeding expert witness a written copy of the instruction.

Mr. Cassin: Well, can I be able to know that it was wrong to go into the bank and take it up, and could he be able to know which was right to take the bank and take it up?

Dr. Caprio: There is a difference when you say "know." This is a capital [illegible] subject. It requires the process of reasoning, the maturity of faculties, to fully comprehend the consequences, the nature of a specific act. I don't know which [illegible] you are using in the term "know."

The matter was cross-examination turned to the subject of freedom of will, and there was no further reference, by Dr. Caprio or any other witness, to appellant's capacity to distinguish right from wrong.

3. The trial. In his opening argument to the jury, the prosecutor made reference to Dr. Caprio's testimony on the right-wrong distinction. He argued:

> "I asked questions on the individual exercise freedom of choice, and I need not go into. He was asked, members of the jury, if he was capable of distinguishing between right and wrong. Do you recall what he said: I don't know what you mean between right and wrong.
>
> . . .
>
> "Well, members of the jury, if he doesn't know or if he can't distinguish between right and wrong, there is no need, even though the question was propounded, there was no need to propound any more questions. If he says, 'I don't know what you mean by the difference between right and wrong.'" (2 Tr. 15)

No objection was made to this argument.

IV. The Trial Court's Instructions

In this final part of our statement, we set forth the facts relevant to the two points raised on this appeal respecting the trial court's charge to the jury. Both points concern the instructions on the issue of insanity.

One concerns these instructions generally while the other concerns them in specific part.

The only fact relevant to our general contention is that the insanity instructions were delivered orally to the jury. Our point is that they should in addition have been delivered in writing. This point was not made below, but as we will show later the trial court's failure to make the insanity instruction available in writing was an error that affected substantial rights of appellant and may therefore be noticed.

Our specific contention concerns the following instruction, and our point here is that it should not have been given at all:

> "In determining whether there was a causal relationship between the defendant's mental condition and the offense with which he is charged, you may consider evidence bearing on his capacity or lack of capacity to distinguish right from wrong, and his ability or lack of ability to refrain from doing the wrong or unlawful act.
>
> "If you find beyond a reasonable doubt that the defendant committed the offense, or believe that he did not know right from wrong at the time he did so, then his act would be the product of a mental disease or defect; and you must find him not guilty by reason of insanity.
>
> "If you find beyond a reasonable doubt that the defendant committed the offense, but believe that he did not have the ability to refrain from doing the act, then his act would be the product of a mental disease or defect, and you must find him not guilty by reason of insanity.
>
> "However, if you believe that the defendant did know right from wrong, or that he had the ability to refrain from doing the act, you may still find on the basis of other evidence that his act was a product of a mental disease or defect.

> "In lieu of a defendant's sanity or lack of sanity as that word is commonly used, and his ability or inability to act by law, being the words of the statute, should be considered by you also whether or not the evidence casts on his mental condition that he knew right from wrong and was able to adhere to the right and refrain from doing that which he knew was wrong and which was unlawful" (2 Tr. 56-57.)

At the conclusion of the entire charge, when asked if he had any objections, defendant's counsel noted that "the right and wrong test could be confused because as I read it there is no testimony on right and wrong." The court disposed of this objection with the remark: "There is evidence by inference," (2 Tr. 92) and no corrective instruction was given.

ARGUMENT

Our central contention is that the prosecutor's closing argument and the trial court's instructions denied appellant a fair determination of his insanity defense.

Our points respecting the prosecutor's closing argument are (1) that it introduced an issue -- the character of appellant's military service -- that had no relevance in the case, that was not raised by the evidence, and that carried a very high probability of prejudice, and (2) that it asked the jury to draw from the defense psychiatrist's refusal to answer questions relative to appellant's capacity to distinguish right from wrong three wholly unwarranted and improper inferences -- first that such capacity had a significant bearing on appellant's mental responsibility, and second and third that the psychiatrist's refusal to answer had a significant bearing on both his professional competence and his veracity as a witness.

Our points respecting the trial court's charge to the jury, which we think have added force in the context of the prosecutor's closing argument, are (1) that no instruction should have been given on appellant's capacity to distinguish right from wrong since there was no evidence on the matter, (2) that even if it was proper to give the instruction in the absence of evidence on the matter, it was improper to do so without at that same time telling the jury that incapacity to distinguish right from wrong is not typically found in even the most serious mental disorders, and (3) that in any event only the delivery of the instructions in written form could have given any reasonable assurance that the jury understood the legal principles applicable to the insanity issue.

[illegible] [illegible]

We have already [illegible] the prosecutor's comment [illegible] attempts to [illegible] -- [illegible] -- [illegible] about the [illegible] of the principal defenses. We deal in more detail below with the separate respects in which the comment was objectionable. Preliminarily we note again that objectionable only because very forcefully. While is an important consideration in weighing the impact of the prosecutor's improper remarks on the fairness of the trial, for which error in argument on a "core-center issue" are ones for which this Court has said a prosecutor is "more likely" to be held accountable. Hill v. United States, 129 U.S. App. D.C. 316, 350, 372 F.2d 383, 395 (1967).

1. The reference to appellant's 1944 mental illness

The basic insanity issues in the case were whether appellant suffered from mental illness at the time of the alleged offenses in 1967 and, if so, whether that illness and those offenses were causally related. There was evidence that in 1944 a diagnosis had been made at a military hospital that appellant was suffering from a mild psychoneurosis of undetermined cause. This evidence was given emphasis by defense counsel in his own summation (see 2 Tr. 34), and it was obviously a fair target for comment by the prosecutor in his rebuttal argument. He could have argued that the existence of a mild illness in 1944 was not a reliable indicator of any abnormal mental condition in 1967, much less of a causal relation between any such condition and offenses of assault and robbery. He could have argued that the 1944 diagnosis was evidently dismissed as

unimportant by Dr. Martin after full consideration. Other forms of argument may well have been possible. What the prosecutor could not permissibly do, however, was to suggest, without any record support, that the 1944 illness was attributable to appellant's unpatriotic or cowardly desire to avoid active combat at the most critical period of the most serious war in this nation's history. Yet this is precisely what the prosecutor did. At that point his argument ceased to be a process of reasoned inference and became an appeal to passion, unsupported by evidence and calculated to arouse the jury against appellant with serious resulting prejudice to his insanity defense.

The prosecutor invited the jury's attention to the fact that the 1944 diagnosis was made -- in Utah -- shortly after D-Day. Already there was an ugly implication that appellant was blameworthy in the event -- that Utah was no place for a man in military service when the battle for France was being waged. Apparently not content with mere implication, the prosecutor went on to make his meaning more explicit: "May not this individual have been apprehensive because the landing had taken place shortly before that. Was he apprehensive, members of the jury? Was he apprehensive that he was going overseas?" The thought was now unmistakable. Appellant had either feigned illness to escape an overseas combat assignment or else, if he did in fact suffer illness, it was induced by the fear of such an assignment. In either case appellant was guilty of a shameful act in wartime and for that reason was not entitled to favorable consideration by the jury.

The standard of fairness to which a prosecutor must adhere in argument is well recognized. His duty is to stay within the limits of the evidence and the inferences that can reasonably be derived. 8/ When the boundaries thus defined

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8/ See, e.g., United States v. Browning, 330 F.2d 511, 513 (4th Cir. 1964); United States v. Edwards, 325 F.2d 395, 398 (3d Cir. 1963); Luttrell v. United States, 320 F.2d 462 (5th Cir. 1963); United States v. Barbone, 283 F.2d 628, 632 (3d Cir. 1960), cert. dismissed, 365 U.S. 805; United States v. Sober, 281 F.2d 244, 250 (3d Cir. 1960)

are remedial, adversary exercise.

> "It is the prosecutor's obligation to avoid improper comment and where he fails in that regard, even only by inadvertence, it is his duty to take all other steps open to him to cure the error and to see that the accused is not prejudiced by it." Hill v. Brown, [illegible].

the impropriety of an objection is undoubtedly the assumption of fairness that a jury is likely to indulge in favor of a prosecuting official. Berger v. United States, 295 U.S. 78, 88 (1935).

Because the bounds of proper argument are shaped by the unique circumstances of each prosecution, we do not view the applicable precedents as dispositive of our contention in this case. However, we have found a sizable number of recent cases in which convictions have been reversed on the basis of remarks no more offensive in their trial contexts than the prosecutor's remarks in the context of appellant's trial. Rather than burden the text, we have collected these case references in a footnote. 2/

2/ Brown v. United States, 125 U.S. App. D.C. 220, 370 F.2d 242 (1966)(comment that to acquit defendant of assault on police officer would leave police powerless to protect themselves short of martial law); United States v. Schwartz, 325 F.2d 355 (3d Cir. 1963)(where defense witness admitted that he had been dismissed from Internal Revenue Service for immoral conduct he identified as "falling in love with another woman," comment that his testimony should not be believed because of his admitted "adultery" and "going into hotel rooms"); United States v. Barron, 304 F.2d 177 (2d Cir. 1962)(where only issue was whether defendant had knowledge that drugs present in his apartment, repeated emphasis that drugs were found concealed near children's toys); Traxler v. United States, 293 F.2d 327 (5th Cir. 1961)(in prosecution for possession of untaxed whiskey, comment about highway death toll); Hansford v. United States, 249 F.2d 295 (9th Cir. 1958)(same); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960)(in prosecution for evasion of 1952-1953 personal taxes, comment that defendant paid only $37.81 in taxes during war year of 1943, when no evidence that $17.81 less than the amount actually owed in 1943). And see Viereck v. United States, 318 U.S. 236 (1943)(in prosecution under Foreign Agents Registration Act, Court suggests without deciding that appeal to passion of jury would require reversal apart from other errors in case). All these decisions involved unsupported inferences and the introduction of prejudicial side issues by the prosecutor. Of course comment on facts not received in evidence or previously excluded are also ground for reversal. Garris v. United States, 120 U.S. App. D.C. 96, 390 F.2d 862 (1968); Feichant v. United States, 123 U.S. App. D.C. 224, 359 F.2d 278 (1966); Johnson v. United States, 121 U.S. App. D.C. 19, 347 F.2d 403 (1965).

If we are correct in our view that the prosecutor's remarks on the 1944 diagnosis conveyed to the jury the thought that appellant's military record was less than honorable -- and if there is any doubt whatever in the matter, we think it is removed by the prosecutor's two earlier incorrect references to appellant's discharge as "dishonorable" -- it can hardly be seriously urged that those remarks were within the field of legitimate argument. Uncontradicted evidence that appellant suffered in 1944 from a mental illness of "undetermined cause" simply will not support an inference that appellant either feigned or contracted the illness due to his fear of an "overseas assignment at the time of D-Day."[10/]

The probable prejudice to appellant would be clear enough if the only effect of the prosecutor's unfounded remarks was to invite rejection of the insanity defense on the ground that appellant had an inglorious military record. But there was an even more serious and direct effect. The jury may well have concluded that a person who would pretend mental illness to avoid an "overseas assignment" might likewise pretend mental illness to escape a criminal conviction. Accordingly there is good reason to suppose that the jury may thus have been led to reject appellant's claim of mental illness in 1967 as a self-serving contrivance -- just as the prosecutor suggested it had been in 1944.

10/ In another part of his argument the prosecutor sought to impeach the examination that led to the diagnosis of mental illness in 1944. "If any of you have ever been in the Army, you know what kind of routine examination that you get from the psychiatrist when you go to the Army" (2 Tr. 21). There was a basis in the record for the statement that the examination was routine (Dr. Platkin testified at Tr. 756 that appellant had so described it at the staff conference), but there was no basis -- and common knowledge does not supply one -- for the suggestion that a routine psychiatric examination in a military hospital is either haphazard or unreliable.

Defense counsel [illegible] timely objection 11/ to the prosecutor's remarks on "[illegible]," and moved for a mistrial. [illegible].

2. [illegible]

Dr. Caprio's [illegible] importance to appellant's insanity defense since [illegible] tended to establish the existence of a serious mental [illegible] and the only evidence tending to establish a causal relationship to the alleged offenses. [illegible] the prosecutor attacked not only the professional judgment of this witness but also his personal integrity. The attack was plain error. It was based on an action of the witness -- a refusal to answer certain questions -- that was affirmatively required by the trial court's instructions and from which this Court has said no negative inference may be drawn.

The standard instruction to expert witnesses in insanity cases was given in writing to Dr. Caprio before he appeared for direct examination. The instruction was mandatory under Washington v. United States, 129 U.S. App. D.C. ____, ____-____, 390 F.2d 444, 456-458 (1967). It directed the witness, among other things, not to answer questions that turned on considerations of "morality as distinguished from medical knowledge," and to seek clarification before answering questions that were "unclear or may have more than one meaning." During cross-examination by the prosecutor, Dr. Caprio was asked whether appellant was able "to distinguish right from wrong" and to "adhere to the right and resist the wrong." He twice replied: "I don't know what you mean by 'right and wrong.'"

11/ The timeliness of the objection was not destroyed by the fact that it was withheld until the prosecutor had concluded his argument. Cf. Harris v. United States, ____ U.S. App. D.C. ____, ____, 402 F.2d 656, 657 (1968).

Ultimately he sought a clarification of the question, which was not forthcoming. There matters stood until the summation, when in reference to Dr. Ceprio the prosecutor argued:

> "Well, members of the jury, if he doesn't know or if he still distinguish between right and wrong, [illegible] asked, was there? The question was propounded, there was no need to propound any more questions. If he says, 'I still don't know the difference between right and wrong.'"

This comment was a foul blow -- a rather impressive one in the extent to which it was destructive of appellant's insanity defense.

The two major defects of the Millhaven rule, long since discarded[12] as the measure for determining criminal responsibility in this Circuit, were: first, that it encouraged psychiatrists to say whether an accused knew right from wrong, even though these terms are without particular medical meaning; and second, that the right-wrong test required psychiatrists to make a moral judgment about the accused.[13] Because the "right" and "wrong" labels continued to subvert insanity determinations even under the Durham standard, this Court made explicit the principle that a psychiatrist "may not be compelled to testify in these terms [capacity to distinguish right from wrong] if he believes they are essentially moral or legal considerations beyond the scope of his special competence as a behavioral scientist." McDonald v. United States, 114 U.S. App. D.C. 120, 124 n.9, 312 F.2d 847, 851 n.9 (1962)(en banc). The purpose here was to emphasize that the psychiatrist and the jury have entirely separate functions in insanity cases. Even after McDonald, however,

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12/ Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).

13/ Washington v. United States, 129 U.S. App. D. C. ___, ___, 390 F.2d 444, 451 (1967).

[illegible] 14/ [illegible] had not yet been [illegible] [illegible] "[illegible]" Washington v. United States, supra, 129 U.S. App. D.C. at ___, 390 F.2d at 452. One method adopted in Washington [illegible] specifically instructed [illegible]. The object of this instruction was to "[illegible] in Court, and [illegible]." 129 U.S. App. D.C. at ___, 390 F.2d at 456.

It seems obvious that a psychiatrist who adheres to the role that this Court has carefully defined for him should not be subjected on that account to [illegible] by the prosecutor. And this is exactly what the Court said in King v. United States, 125 U.S. App. D.C. 318, 332, 372 F.2d 383, 397 (1967), finding that the prosecutor had acted improperly in urging the jury in his summation to draw an adverse inference from the defense psychiatrist's reluctance to answer questions concerning the capacity of the defendant to distinguish right from wrong.

The prosecutor at appellant's trial also served as government counsel in King, so he could scarcely have been a stranger to the restraints on his conduct imposed by that decision. Still he openly defied those restraints, arguing that there was nothing to be learned in the testimony of a psychiatrist who was unable to distinguish right from wrong.

14/ See, e.g., [illegible] v. United States, 123 U.S. App. D.C. 330, 360 F.2d [illegible] (1966)(concurring [illegible] of Chief Judge Bazelon); Rollerson v. United States, 119 U.S. App. D.C. 400, 343 F.2d 269 (1964).

The vice of the prosecutor's argument was threefold:

First, it implied that a competent psychiatrist would have been able to determine appellant's capacity to distinguish right from wrong -- that Dr. Caprio was therefore lacking in professional skill. In fact, of course, no issue of Dr. Caprio's competence as a psychiatrist was raised by his exchange with the prosecutor on which this argument was predicated. Quite simply, Dr. Caprio had refused to answer questions of morality for which medical science has no answers -- at least until there has been the clear definition of terms that the witness requested but that the prosecutor was either unwilling or unable to give. In this refusal Dr. Caprio was obedient to the trial court's instruction and to the repeated promptings of this Court on the proper function of the expert witness.

Second, it implied that appellant's capacity to distinguish right from wrong would have been highly relevant if it could have been established -- and the prosecutor left no doubt that in his mind it should have been established. In fact, such capacity "suggests only the absence of a symptom 'which medical science has long recognized do[es] not necessarily, or even typically accompany even the most serious mental disorder.'" King v. United States, supra, 125 U.S. App. D.C. at 332, 372 F.2d at 397, quoting Durham v. United States, 94 U.S. App. D.C. 228, 242, 214 F.2d 862, 876 (1954).

The third and perhaps the greatest evil of the argument was its clear implication that Dr. Caprio did not know the difference between right and wrong in his own affairs. "Well, members of the jury, if he doesn't know or if he can't distinguish between right and wrong . . . ." Here in effect was an argument that Dr. Caprio's refusal to make moral judgments about appellant was an indication that he was himself an amoral man. To the charge that Dr. Caprio's

[illegible] of his professional incompetence [illegible] worthy of belief.

[illegible] chief defense [illegible], and [illegible] capacity to [illegible].

3. [illegible]

We have already [illegible] the prosecutor [illegible] the professional competence of Dr. Caprio. [illegible] by which [illegible].

In his summation the prosecutor [illegible] stress on the fact that Dr. Caprio, unlike Dr. Platkin, was not a diplomate of the American Board of Neurology and Psychiatry. Thus he stated (2 Tr. 19):

> "But this individual [Dr. Caprio], this individual who says that he graduated from medical school in 1964, and who is not a diplomate yet in the field of psychiatry, neurology, as Dr. Platkin is, this individual who is not a psychologist, is not psychiatrist, when he is asked about these psychologicals that were given him -- and I don't want to use the word audacity -- he said they were improperly interpreted . . . ."

See, also, the comment at 2 Tr. 18. The point being made was that the jury should prefer the judgments of Dr. Platkin to those of Dr. Caprio because the former had the superior qualifications.

In a case like this one where the insanity defense turns in large measure on the jury's resolution of the conflicting testimony of expert witnesses, an argument that the Government's expert is better qualified than the defendant's

expert is relevant and proper.[15] But such an argument, like all others but more importantly since it deals with the critical issue in the case, must be confined to the facts in evidence and the inferences that reasonably can be derived.

The only evidence of the significance of being a diplomate was the brief statement by Dr. Platkin explaining that there was an eligibility requirement (which Dr. Caprio may not have satisfied (Tr. 147)) and that an examination was involved (Tr. 64-65). What considerations may inhere in the decision to take or not to take this examination, and the importance that attaches within the profession to being a diplomate, were never explained. We doubt, therefore, whether there was sufficient basis in the evidence for the inference that Dr. Platkin was the better qualified psychiatrist because he was a diplomate. But certainly, the fact that Dr. Caprio was not a diplomate did not justify the further statement by the prosecutor that he "is not a psychiatrist" and the suggestion that it was an act of "audacity" for Dr. Caprio to question the interpretation given by the staff at Saint Elizabeths to the results of psychological tests administered to appellant.

In King v. United States, supra, 125 U.S App. D.C. at 332, 372 F.2d at 397, this Court saw:

> ". . . no warrant in this case for [the prosecutor's stressing to the jury, through summation, that the testifying psychiatrists were not diplomates where there was no contrary psychiatric testimony. The argument carried the implication that a more experienced expert might or would have reached a different conclusion. If there was any basis for such an implication it should have been adduced in the form of testimony presented by the Government, which had the burden of proof."

15/ We do not consider the propriety of such an argument where the defendant's expert has been furnished by the Government. See King v. United States, supra, 125 U.S. App. D.C. at 332 n.11, 372 F.2d at 397 n.11. In this case the defense expert was furnished at appellant's own expense.

[illegible] Dr. Caprio [illegible] (ever [illegible] and [illegible] there was [illegible] basis for [illegible] of testimony [illegible] of proof."

[illegible]

We [illegible] insanity instructions were [illegible] (1) [illegible] because they [illegible] the jury [illegible] appellant's capacity to distinguish right from wrong where there was no evidence but where there was a highly misleading argument on this point, and (2) in form because they were not delivered to the jury in writing.

3. [illegible]

The only testimony during the trial concerning appellant's capacity to distinguish right from wrong was Dr. Caprio's statement to the effect that he was unable to answer the prosecutor's questions as to appellant's capacity in this regard unless the prosecutor at least clearly defined what he meant by the terms "right" and "wrong." This inability to answer questions was not evidence of appellant's capacity to distinguish right from wrong. It didn't tend to prove anything one way or the other in this regard. Yet it is the only discoverable basis in the record for the five-paragraph instruction, previously

set out in full, [illegible] the jury is entitled, in determining the [illegible] issues, evidence of appellant's capacity to distinguish right from wrong. Our conclusion is that [illegible] it was error to give the instruction, or that it was [illegible] to be withdrawn or countermanded the instruction after defense counsel had [illegible] appropriate objection.

Appellant's [illegible] right-from-wrong is not a standard instruction that can be given [illegible] evidence to justify. It is appropriate to give the instruction [illegible] issue of capacity has been brought into the case. Such has been the rule since [illegible] said:

> "The jury may be instructed, provided there is testimony or [illegible], that cowardice, or lack thereof, to disting[illegible] from crime . . . may be considered in order to [illegible] there is a relationship between the mental disease and the act charged." 124 U.S. App. D.C. at 324-325, 332 F.2d at 851-852.

This rule was repeated, with the words "provided there is testimony on the point" italicized for emphasis, in Blocker v. United States, 116 U.S. App. D.C. 78, 80, 320 F.2d 800, 802 (1963), cert. denied, 375 U.S. 923 (affirming the conviction on a finding that there was a proper evidentiary finding for the instruction).

We are aware of the holding in Simpson v. United States, 116 U.S. App. D.C. 81, 320 F.2d 803 (1963) that "in the circumstances" of the case it was not plain error to give the instruction in the absence of evidence on the point. What "circumstances" were considered in Simpson is a matter on which the opinion is silent, but we assume that they did not include an attempt by the prosecutor

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16/ Supra pages 16-17. The trial court's theory that there was "evidence by inference" of appellant's capacity to know right from wrong is untenable. The entire evidence, of course, was a proper basis for the jury's judgment about the quality of appellant's acts. But there was no basis for the jury to conclude that a moral "right or wrong" judgment had been made by the experts (or by any other witness); i.e., that there was a medical idea of rightness and wrongness that had only to be found and followed to arrive at a correct verdict. The trial court's theory would permit a "capacity" instruction in every case involving an insanity defense and thus nullify the rule stated in McDonald and reaffirmed in Blocker.

[illegible] (17)

[illegible]

Even if under the circumstances the trial court was free to give the "[illegible]" instruction, it should have taken the curse off -- at least partially -- by informing the jury that even the most serious mental disorders are not typically characterized by an incapacity to distinguish right from wrong. This Court has said that a defendant is entitled to such a limiting instruction on request. King v. United States, supra, 125 U.S. App. D.C. at 332, 372 F.2d at 397. Here it was a minimum condition of fairness to appellant even [illegible] without an explicit

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17/ For a discussion of jury reactions to the insanity defense and to the different standards of mental responsibility, see Simon, The Jury and the Defense of Insanity (1967).

regard a prior jury finding that the defendant was [illegible] as specific to any disability or mental condition which may exist at the time of the offense -- or otherwise to limit the scope of admissible lay opinion testimony to the "ultimate" issue of sanity. [illegible] the court's refusal to give the limiting instruction sought is not [illegible] for the limiting instruction outlined in III.

2. [illegible]

We believe that it is [illegible] from responsibility for the acquittal [illegible] in the District of Columbia, [18/] this Court should adopt a rule making it clear that the jury is instructed on the insanity issue in writing as well as orally, and that the written form of instruction is made available to the jury during its deliberations. [20/] Such a rule would undoubtedly lead to a fuller understanding by the jury of the legal principles applicable to the insanity defense. It is therefore a necessary corollary of the rule that allows the jury to decide criminal responsibility. [21/]

The insanity instructions in this case fill eleven pages of transcript (2 Tr. 82-92). The matters covered are both numerous and complex. They include the presumption of sanity, the effect of that presumption once evidence of

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18/ Supra page 26.

19/ See, e.g., Durham v. United States, 94 U.S. App. D.C. 228, 240, 214 F.2d 862, 874 (1954); Edwards v. United States, 114 U.S. App. D.C. 120, 124-125, 312 F.2d 847, 850-851 (1962)(en banc); Washington v. United States, 127 U.S. App. D.C. ___, ___-___, 390 F.2d 444, 455-456 (1967); Tuscano v. Corcoran, ___ U.S. App. D.C. ___, ___ F.2d ___ (decided June 3, 1969, slip op. 12).

20/ It may be that a similar rule should be imposed in other circumstances when the instructions on key issues are lengthy and complex, or that written instructions should be made available to juries in all cases. However, it is unnecessary to decide those questions in this case.

21/ "[T]he necessary corollary of the rule allowing lay men to decide responsibility is that they must be given the fullest information possible." Jackson v. United States, 113 U.S. App. D.C. 341, 346, 336 F.2d 878, 884 (1964)(opinion of Chief Judge Bazelon concurring in part and dissenting in part).

[illegible] 22/ [illegible] 23/ [illegible]

If the [illegible] a jury on the immunity defense is merely to convey a rough sense of the relevant considerations, then an oral presentation

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22/ In addition, the jury in this case was called upon to remember lengthy instructions covering the elements of the five [illegible] offenses as well as a variety of [illegible] matters [illegible] standards of proof, credibility of witnesses, direct and circumstantial evidence, character evidence, failure of an accused to testify, etc. To [illegible] the jury was given an instruction on [illegible] to the [illegible] discussed in [illegible], ___ U.S. App. D.C. ___, ___ F.2d ___ (decided [illegible], No. [illegible]).

23/ See, e.g., [illegible], 109 U.S. App. D.C. ___, ___ F.2d ___, 3 [illegible] (decided [illegible]).

is [illegible], sufficient. [illegible] that there is a difference [illegible] — [illegible][24] serves, [illegible] of the precise legal [illegible]. [illegible] the [illegible] legal [illegible] that the [illegible] will be

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24/ [illegible] this [illegible] by the results of the study [illegible] 17. [illegible] a total [illegible] in three [illegible] cities, [illegible] claim. [illegible] by [illegible] that they [illegible] by reason of insanity [illegible] found [illegible] (used by [illegible] juries) considered most [illegible] for analysis, [illegible] acquittals returned by juries instructed under Durham [illegible] of similar verdicts returned by juries instructed under [illegible] at 216. [illegible] conclusion was that the details of the instruction were critically important.

We note that the juries participating in this experiment were first instructed orally and then given the instructions in written form to use during their deliberations. Id. at 153. The only jury whose transcribed deliberations appear in Appendix A of the study found it necessary to consult the written instructions. Id. at 225.

25/ On the special and complex nature of the issues presented by the insanity defense, the Chief Judge of this Court has said:

> "Ordinarily the jury has, with the aid of the court's instructions, the task of determining the question of responsibility. The underlying assumption is that it will be fully informed. This requires a diligent effort by counsel to present all the relevant evidence and to present it so that the jury can understand it.
>
> * * *
>
> "The duty to inform does not end with the presentation of such material; counsel must insure that the significance and meaning of the information is clearly explained by the witnesses. Defenses other than insanity may involve matters familiar to the jurors; in such cases they can sift and appraise the evidence without special assistance. Inconsistencies or gaps may be readily apparent. But the defense of insanity involves matters which are complex and unfamiliar to most jurors. Proper understandings and knowledge are necessary before the evidence can be intelligently used to reach a reasoned verdict.

(Cont'd next page)

[illegible] of the trial [illegible] as a written form of the [illegible] which were made [illegible] complex than [illegible] trial terms.

While we can [illegible] appeal for our view in the authorities we have examined, neither have we found any compelling reason why the rule we

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(cont'd) "In this case, [illegible] the inescapable presentation of the family [illegible] fairly be abolished to counsel; it results from [illegible] course of the questioning and the failure to direct counsel to acquire expert assistance." Washington v. United States, 123 U.S. App. D.C. 340, 359-360, 360 F.2d 914, 933-934 (1966)(concurring opinion).

24/ At the close of the instructions, when the trial jury had retired [illegible] counsel were discussing [illegible] petition of one juror to read certain portions of the [illegible] the jury, counsel for [illegible] "I am going to object to any [illegible] in the jury room [illegible] interrupt (Tr. 36). It is apparent from [illegible] that this matter [illegible] to the exhibits. The nature of written communications [illegible] record.

25/ [illegible] Rule 6 [illegible] the trial court has the discretion to excuse [illegible] [illegible] v. [illegible], [illegible] (D.C. Cir.), [illegible] 1966); [illegible] v. United States, [illegible] 2 U.S. 492; [illegible] v. [illegible], [illegible] 2 U.S. 492; [illegible] v. [illegible], [illegible] (5th Cir. 1966); [illegible] v. [illegible], [illegible] U.S. App. D.C. [illegible], [illegible] F.2d 537 (D.C. Cir. 1966); [illegible] v. [illegible], [illegible] U.S. App. D.C. [illegible] (D.C. Cir.)

28/ Illustrative of this interest is the following observation in Washington:

> "We all agree that it is certain limited role in any criminal trial [who is a reference to the standard of proper mens rea the jury is under a duty to apply] even if it is only limited role in ascertain the evidence which is put before the jury. To be certain, the jury's wide latitude in deciding the issue of responsibility requires [a] trial judge and appellate judges ensure that the jury base its decision on the behavioral data which are relevant to a determination of blameworthiness.13/"

____ U.S. App. D.C. at ____, ____, 390 F.2d at 446-447.

Footnote 13 in the Washington opinion is as follows:

> "Our role here is analogous to our role in the administrative process. The administrative agency is given wide latitude in making judgments. Our responsibility is to ensure that the agency examines all the relevant facts and reaches a rational responsibility vis-a-vis the jury."

29/ See, e.g., St. [illegible] v. [illegible] [illegible]. [illegible] mens rea [illegible] [illegible] [illegible] "failed" [illegible] mental [illegible] process of the accused.

[illegible]

CONCLUSION

Appellant did not receive fair consideration of his [illegible] defense. The judgment should therefore be reversed and the cause remanded for a new trial.

Respectfully submitted,

Richard T. Conway

734 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorney for Appellant
(Appointed by this Court)

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,136

(Criminal No. 1065-67)

WILLIAM FRANCIS COLLINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

Richard T. Conway

734 Fifteenth Street, N.W.
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CITATIONS

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REPLY BRIEF FOR APPELLANT

In Part I of this reply brief, we deal with appellee's contention that the prosecutor's closing argument and the trial court's instructions to the jury were not, as we urged in our opening brief, so seriously flawed as to require a new trial. In Part II we advance a new argument -- that appellant was improperly convicted and sentenced on multiple offenses arising out of the same transaction and is therefore entitled to resentencing and other relief even if he is not entitled to a new trial. Our Part II argument was not made earlier because it is largely based on this Court's decision

in Bryant v. United States, No. 21,863, decided on August 7, 1969 -- some five weeks after our opening brief was filed.

I

The Prosecutor's Summation

We have already set forth our view that the prosecutor's closing argument carried him far beyond the range of fair comment in an effort to discredit appellant's insanity defense. In an indiscriminate attack on the defense, the prosecutor's argument brought into question -- by inferences having no basis in the evidence -- the personal character of the appellant and the integrity and professional medical competence of appellant's principal expert witness.

Appellee's brief puts no facts or legal principles in dispute. The argument is simply that innocent meanings can be found for the remarks that we consider objectionable. In the search for the innocent, however, appellee lost sight of the obvious.

So, for example, appellee characterizes the prosecutor's comments (see page 15 of our opening brief) concerning Dr. Caprio's alleged inability to distinguish right from wrong as an uncritical and factual account of the testimony at trial. This highly disingenuous interpretation would be impossible to accept even if the prosecutor's remarks could be treated

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1/ As we have shown, the prosecutor's comments were neither factual nor uncritical. Dr. Caprio did not say, as was asserted in the argument, that he himself could not distinguish between right and wrong. He said that he didn't understand the prosecutor's meaning of right and wrong and was therefore unable to answer questions regarding appellant's capacity to make right-wrong distinctions. It is perfectly apparent that Dr. Caprio was seeking clarification of a question that he considered imprecise, and there is nothing whatever to suggest that he would have been unable or unwilling to respond to further questions formulated in precise terms. We have already discussed (see pages 23-27 of our opening brief) the three adverse inferences that we believe the prosecutor was urging the jury to draw from Dr. Caprio's commendable hesitation in responding to the right-wrong questions.

as a disconnected fragment of argument. In fact, of course, the remarks must be read in the context of an argument during which the prosecutor repeatedly invited 2/ the jury to reject Dr. Caprio's diagnosis because of his alleged lack of experience and inferior qualifications as a psychiatrist. Under these circumstances appellee's suggestion that the alleged inability to distinguish right from wrong was not being used by the prosecutor as an additional weapon to destroy Dr. Caprio in the eyes of the jury passes from the unreasonable to the absurd.

In his rebuttal argument to the jury, addressed entirely to the insanity defense, the prosecutor suggested that appellant's 1944 mental illness, which was of "undetermined cause" according to the only evidence on the point, had been "precipitated because this country was at war" and because "the landing (D-Day) had taken place shortly before" with the prospect "that he was going overseas." Appellee argues that these comments were permissible since "apprehension after D-Day . . . could justifiably be shared by many normal people" (Appellee's brief, page 10) and therefore raised no unfavorable inferences about appellant's character or the quality of his military service.

We doubt that it is ever appropriate for counsel, whose training is in law and not in medicine, to suggest to the jury the specific cause of a mental illness described by the evidence as being of "undetermined cause." In our view the origin of mental illness is a subject for expert testimony rather than amateur theorizing by the prosecutor, just as in King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967), this Court held that it was improper for the prosecutor to assert his belief that the defendant

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2/ See, e.g., 2 Tr. 5, 8, 13, 14, 18, 51, 55.

was not suffering from organic brain damage.[3] Even if we are wrong about this as a general proposition, however, we think that as a minimum condition of fairness the prosecutor must refrain from speculations that associate mental illness with weak or dishonorable traits of character. Here appellant's 1944 mental illness became, according to the prosecutor's subjective diagnosis, the product of fear (and perhaps a deliberately contrived product), induced by the prospect of "going overseas" to take part in the D-Day landing. We find it impossible to take seriously, as a defense of the prosecutor's conduct, appellee's contention that "apprehension after D-Day . . . could justifiably be shared by many normal people" and therefore reflected no discredit on appellant. It was scarcely the prosecutor's point that appellant shared in some general sense of uneasiness, although even that suggestion would have been wholly conjectural. The emphasis was not on a sameness of feeling but on a difference in action. The point being made was that appellant took refuge in a hospital while others went to war.

The Instructions To The Jury

Appellee agrees that there was no direct evidence touching appellant's capacity to distinguish right from wrong, but argues that there was indirect evidence from which appellant's capacity in this regard could be inferred and that the instruction authorizing the jury to consider "evidence bearing on his capacity or lack of capacity to distinguish right from

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3/ "It is elementary that a prosecutor may not import his own testimony into a criminal trial. (Footnote omitted). The doctrine has full vitality not only where the prosecutor is asserting a fact within his individual cognizance, but also where, as here, the prosecutor is asserting a belief or opinion that is properly the subject of expert testimony. The prosecutor is not free to offer his opinion in lieu of calling an expert witness." 125 U.S. App. D.C. at 329, 372 F.2d at 394.

wrong" was therefore proper. The indirect evidence on which appellee relies is (1) the testimony of Dr. Caprio that appellant was able to exercise a free choice with respect to the assumed offenses in the sense that his decision to commit or not to commit the acts involved would have been governed by conscious mental processes (Tr. 594-596), and (2) Dr. Caprio's testimony that he didn't think appellant would have committed the assumed offenses in the presence of a police officer (Tr. 625-626).

As authority for the position that an instruction on capacity to distinguish right from wrong may be given in the absence of direct evidence, appellee cites McDonald v. United States, 114 U.S. App. D.C. 120, 124-125, 312 F.2d 847, 851-852 (1962) (en banc), holding that the capacity instruction is proper "provided there is testimony on the point." We had thought that the McDonald decision was strong authority against the position taken by appellee. We still think so. The obvious purpose of the proviso in McDonald was to limit the use of the instruction on capacity to distinguish right from wrong,[4/] so that the jury would not be distracted by the rejected standard of criminal responsibility and the insanity issue would not be dominated by counsel's emotional appeals to lay ideas of right and wrong. Appellee's position would inevitably defeat this purpose, since if the instruction was justified in this case it would be appropriate in every case involving the insanity defense.

We take it that capacity to distinguish between right and wrong means a mental capacity to make moral distinctions between acts on the basis that some are "right" and others "wrong." Here there was testimony tending

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4/ Any doubt whatever about this purpose should have been dispelled by Blocker v. United States, 116 U.S. App. D.C. 78, 80, 320 F.2d 800, 802 (1963), cert. denied, 375 U.S. 923, wherein the words "provided there is testimony on the point" were repeated with special emphasis in discussing the circumstances under which the capacity instruction is appropriate.

to show that appellant could make practical distinctions between acts on the basis that some would produce different consequences than others, and could regulate his conduct accordingly. But we fail to see how capacity for moral judgment can be inferred from capacity to understand the consequences of an act and to refrain from doing it. Nor do we see how capacity for moral judgment can be inferred from factual knowledge of what is lawful and what unlawful, even assuming with appellee that such knowledge could be imputed to appellant. Further, even if any of this data did support inferences about capacity for moral judgment, it would still not appear whether the relevant standards of right and wrong were to be taken from the expert psychiatrists, or from the prosecutor, or from appellant (none of whom articulated standards in any event), or whether the jury was to formulate its own idea of right and wrong. Without guidance on these questions, and without evidence on which to base even an inference as to appellant's capacity for moral judgment, the jury can only have been confused by the instruction authorizing it to consider "evidence bearing on his capacity or lack of capacity to distinguish right from wrong." This confusion would have been avoided had the trial court observed the limitation imposed by McDonald on the use of the instruction.

Appellee's brief does not address itself to our contention that, if the trial court was free to instruct the jury on capacity to distinguish right from wrong, it was at the same time obliged to advise the jury that such capacity is usually of no medical significance. For the reasons outlined in our opening brief, we think there was a compelling need for this limiting instruction.

Citing the broad discretion traditionally enjoyed by the trial judge and the absence of request by defense counsel, appellee brushes aside in three

short paragraphs our claim that the insanity instructions should have submitted to the jury not only orally but in writing. We agree that a trial judge exercises broad discretion in the matter of written instructions and that the lack of an appropriate request may be a relevant consideration. But we think there are other relevant considerations -- namely the number, complexity, and probable unfamiliarity of the issues being presented and the need for an ordered determination of these issues by the jury. The serious purpose of instructing a jury, after all, is to convey an understanding of the legal principles by which a case must be decided. Where, giving weight to the considerations we have mentioned, it seems improbable that this purpose can be served by an oral presentation, we think the limit of the trial court's discretion has been reached and the instructions must be submitted to the jury in writing. In our view, where the defense is insanity, there can be no assurance of an informed -- and therefore fair -- verdict unless the jury is given a written guide to the galaxy of issues associated with the defense.

It is not clear whether appellee disagrees that written instructions would lead more surely -- and would have led in this case -- to a more informed determination of insanity issues by the jury. If appellee disagrees, then it seems to us that some defense of this view -- other than the mere intoning of the word "discretion" -- should have been offered.

II

<u>If appellant's other contentions are rejected, the convictions for the four lesser offenses should be set aside and appellant should be resentenced for the federal bank robbery offense</u>

We have argued both in our opening brief and in this brief that appellant was effectively deprived of his insanity defense and is therefore

entitled to a new trial. Should the Court find against appellant on this contention, it should nevertheless vacate the convictions for all offenses other than federal bank robbery and then remand the case to the District Court for resentencing on the ground that appellant was erroneously subjected to multiple convictions and sentences for offenses arising out of the same transaction.

As noted in our opening brief, appellant was indicted in five counts[5/] for (1) entering a federally insured savings and loan association with intent to commit robbery in violation of 18 U.S.C. §2113(a); (2) taking the money of the association, "by force and violence and by intimidation . . . from the person and the presence of Gail A. Pond," also in violation of 18 U.S.C. §2113(a); (3) taking the money of the association "from the person and from the immediate actual possession" of Gail A. Pond "by force and violence and against resistance and by putting in fear," in violation of 22 D.C. Code §2901, and (4) assaulting (two counts) Gail A. Pond and Margaret Konakchiysky with a dangerous weapon. As the indictment itself seemed to indicate and as the evidence at trial made certain, all the charges grew out of a series of related events at the Liberty Savings and Loan Association of June 28, 1967. At the close of the evidence the two ADW counts were reduced to simple assaults. The five counts were then submitted to the jury in terms which permitted the jury to return verdicts of guilty as to all of them. The jury did in fact return guilty verdicts as to all counts. Appellant was subsequently sentenced for the five separate offenses, the four (4) to twelve (12) year sentences on the entry with intent to commit robbery count

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5/ The original indictment contained twenty-six counts, but there was a severance and appellant went to trial on a redrafted five-count indictment. See opening Brief for Appellant, note 1. .

and the two robbery counts being imposed to run concurrently with each other and with the one (1) year sentences imposed on the two assault counts.

This Court has held in Bryant v. United States, No. 21,863, decided August 7, 1969, that the defendant may not permissibly be convicted of both the "entering" and the "taking" offenses defined by 18 U.S.C. §2113(a). It held further in Bryant that where multiple convictions and sentences for these offenses do occur, the proper remedy on appeal is to set aside the "entering" conviction and remand for resentencing on the "taking" conviction. Since "entering" and "taking" in violation of 18 U.S.C. §2113(a) were two of the offenses for which appellant was convicted and sentenced, on the authority of Bryant he is plainly entitled to a judgment of the Court setting aside the "entering" conviction and remanding for resentencing on the "taking" conviction.[6/] And see also Benton v. United States, 395 U.S. 784 (1969).

It remains to consider what disposition should be made of the conviction for common law robbery under 22 D.C. Code §2901 and of the two assault convictions, assuming that the federal bank robbery conviction is affirmed.

With respect to the common law robbery offense, the trial judge initially stated an intention to strike the count charging this offense from the indictment and to submit only the federal bank robbery offense

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6/ Trial counsel for appellant took the position that either the "entering" or the "taking" offense, but not both, could be submitted to the jury (2 Tr. 821-822, 827-828, 839). The Bryant decision appears to leave room for the submission of both offenses under an instruction that directs the jury not to consider the "entering" offense unless it first finds a reasonable doubt as to the "taking" offense.

to the jury (Tr. 818). The prosecutor objected to this procedure, apparently on the ground that since the federal offense required proof of an additional element (federal insurance of deposits), the jury might be unwilling to convict on the federal offense but willing to convict on the common law offense (Tr. 818). At the same time the prosecutor said he had no objection to submitting the two robbery offenses to the jury in the alternative -- under an instruction permitting a conviction on one or the other of the offenses but not on both (Tr. 818, 832). On reconsideration of the matter,[7] the trial judge decided, in our view erroneously, to submit both robbery offenses to the jury without any limiting instruction (Tr. 840-841).[8]

Where two criminal offenses have elements in common and arise out of the same transaction, it is the relationship between them that determines the form of their submission to the jury. They may be distinct

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7/ When the trial judge first raised a question regarding the submission of both robbery offenses to the jury, counsel for appellant expressed the view that an election was required by the Government (Tr. 815). Before counsel could develop his position on the issue, however, the trial judge indicated that the common law robbery count would be stricken. The prosecutor made his response, and there the matter rested until the trial judge made his ruling after reconsideration. It seems clear enough in these circumstances that the position of trial counsel would have been, given opportunity for its full articulation, that the common law robbery offense either should not be submitted to the jury at all or should go to the jury as an alternative to the federal offense.

8/ In support of this decision the trial judge cited and relied on United States v. Jakalski, 267 F.2d 609 (7th Cir. 1959) and Neufield v. United States, 73 App. D.C. 174, 118 F.2d 375 (1941), cert. denied, 315 U.S. 798. In Jakalski the holding, in relevant part, was that a federal prosecution under 18 U.S.C. §2113(e) for two killings committed in the course of robbery of a federally insured bank was not barred on double jeopardy grounds by a prior state prosecution (ending in acquittal) for the two killings. In Neufield the holding, in relevant part, was that the crime of robbery as defined by 22 D.C. Code §2901 includes all conduct that would have been robbery at common law and in addition includes cases in which the taking is accomplished by stealthy seizure and snatching rather than by force and violence. Neither case considered the questions whether or how the two offenses of common law robbery and federal bank robbery should be submitted to a jury in a single prosecution.

in the sense that each requires proof of an element not necessary to proof of the other. In this case both offenses may be submitted to the jury under instructions that permit multiple convictions, and the defendant must look for protection to rules requiring concurrent sentences. Fuller v. United States, ___ U.S. App. D.C. ___, ___, 407 F.2d 1199, 1224 (1967) (en banc). Or the relationship between the offenses may be that of lesser and greater in the sense that all elements of one are also elements of the other and that the greater cannot be committed without also committing the lesser. Kelly v. United States, 125 U.S. App. D.C. 205, 206, 370 F.2d 227, 228 (1966), cert. denied, 388 U.S. 913. In this event both offenses may still be submitted to the jury, but the defendant may protect himself against multiple convictions by insisting upon an instruction that no consideration be given to the lesser offense unless the jury finds reasonable doubt and thus acquits of the greater offense. Fuller v. United States, supra, ___ U.S. App. D.C. ___, ___, 407 F.2d 1199, 1227. The Government cannot defeat the defendant's right to the limiting instruction by casting the lesser included offense as a separate count in the indictment. Fuller v. United States, supra, ___ U.S. App. D.C. ___, ___, 407 F.2d 1199, 1230.

Any Section 2113(a) robbery of a federally insured banking institution committed within the District of Columbia necessarily entails a common law robbery made punishable by 22 D.C. Code §2901. An examination of the pertinent statutes or of the indictment against appellant provide equal satisfaction on this point. The essential elements of the Section 2113(a) offense are the forceful taking from another person of property belonging to a federally insured banking institution, while the Section 2901 offense is established by proof that any property was forcefully taken

from the person of another.[9] The Section 2901 offense has no distinct element. It must invaribly occur wherever the Section 2113(a) offense is committed within the District of Columbia. It should therefore have been submitted to the jury as a lesser included offense under an instruction precluding multiple convictions. Significantly, the prosecutor himself proposed a form of instruction that would have precluded multiple convictions.

Since conviction of appellant on both the Section 2113(a) offense and the lesser included Section 2901 offense was not permissible, the latter conviction should be set aside. Bryant v. United States, supra. The two assault convictions should also be set aside on the same ground, since it is impossible to commit a Section 2113(a) robbery in the District of Columbia without at the same time committing a simple assault in violation of 22 D.C. Code §504.[10]

9/ The element of forceful taking in the Section 2113(a) offense is defined, both in the statute and the indictment, as taking accomplished "by force and violence and (the statute uses the disjunctive 'or') by intimidation," while the same element in the Section 2901 offense is defined as a taking accomplished "by force and violence and (the statute uses the disjunctive) against resistance and (again the statute uses the disjunctive) by putting in fear." However, not even the prosecutor suggested that there was any significant difference in the proof necessary to establish the elements of forceful taking as thus defined. And see United States v. Baker, 129 F. Supp. 684 (S.D. Cal. 1955), holding that the word "intimidation" as used in 18 U.S.C. §2113(a) means the same things as the words "putting in fear" as used in common law robbery statutes.

10/ This Court has held that simple assault is a necessarily included lesser offense when the indictment charges a robbery by force and violence. Broughman v. United States, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966). And see Joyner v. United States, 116 U.S. App. D.C. 76, 320 F.2d 798 (1963).

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Reply Brief for Appellant on the United States by causing a copy thereof to be delivered to the offices of the United States Attorney, United States Court House, this 25th day of September, 1969.

Richard T. Conway